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Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment

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LABOR LAW AS THE LAW OF ECONOMIC SUBORDINATION AND RESISTANCE: A THOUGHT EXPERIMENT

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INTRODUCTION

Labor law has always suffered from a degree of definitional ambiguity as well as conceptual and normative incoherence that has detracted from its development and efficacy. But now labor law faces a more significant—an existential—crisis: a future without "labor." In order to assess this crisis, I invite readers to engage in a thought experiment, to consider what historians call a "counterfactual." Imagine that labor law had never been invented, or having been invented, that it had become one aspect of a broader field of legal learning and practice entitled "the law of economic subordination and resistance" that addressed not only relations of employment but all economic relations characterized by comparable asymmetries of wealth and power. After retrieving some fleeting historical glimpses of this "counterfactual," this Article concludes by assessing its attractions as a possible way forward for labor law.

I. THE TROUBLED PAST AND TENUOUS PROSPECTS OF LABOR LAW

Labor law has never had a precise meaning. On the one hand, it might be broadly defined as the norms, processes, and institutions by which the state regulates or mediates relations between employers and employed. Such a definition would extend the reach of labor law to include many legal regimes—taxation, intellectual property, international trade, and social insurance—that shape labor markets and, therefore, power relations and legal relations in the workplace. It would, however, exclude important

† University Professor Emeritus and President Emeritus, York University, Toronto. Provocation for this thought experiment comes from two very different sources: Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. WORKING-CLASS HIST. 56 (1995), and Alan Hyde, *What Is Labour Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2006). I am most grateful to Kristaq Lala for his excellent research assistance.

aspects of labor law which do not originate with the state. On the other hand, labor law might mean whatever subject matter is conventionally taught in law school courses, written about by legal scholars, or practiced by lawyers who identify themselves as specialists in the field. This second definition would doubtlessly include some matters encompassed by the first, but would exclude others. Moreover, definitions of "labor law" are likely to vary amongst countries, legal cultures, and historical eras. It is impossible, however, to think of a definition of labor law that is not centrally concerned with relations between workers and employers.

Workplace relations and labor market regulation long antedate the identification of an academic, professional, or legislative field known as "labor law." Industrial disputes, trade union affairs, employment contracts, workplace safety, compensation for injuries, and maximum hours of work had all become subjects of legislation, judicial pronouncements, and legal texts by the end of the nineteenth century.[1] These subjects, however, were not perceived to constitute a discrete field of professional or academic concern until much later. Courses in labor law were offered in several continental countries in the early decades of the twentieth century,[2] and in English-speaking countries at about the same time or slightly later, sometimes under the title "labor law" (Harvard and Wisconsin 1922–1923),[3] sometimes "industrial law" (LSE 1903),[4] or "master and servant law" (Dalhousie 1915).[5] Labor law, however, effectively emerged as a full-blown academic discipline in the English-speaking world only in the years leading up to and following the Second World War,[6] while "labor law" was recognized by legal taxonomers as a distinct branch of legal knowledge only in the 1950s and 1960s.[7]

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1. Amongst the earliest English language legal texts are JAMES EDWARD DAVIS, THE LABOUR LAWS (1875); SIR WILLIAM ERLE, THE LAW RELATING TO TRADE UNIONS (1869); THOMAS S. COGLEY, THE LAW OF STRIKES, LOCKOUTS, AND LABOUR ORGANIZATIONS (1894); FREDERIC JESUP STIMSON, HANDBOOK TO THE LABOUR LAW OF THE UNITED STATES (1896).

2. Rolf Birk, *Labour Law Scholarship in France, Germany and Italy*, 23 COMP. LAB. L. & POL'Y J. 679 (2002); Matthew Finkin, *Comparative Labour Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW (Matthias Reiman & Reinhard Zimmermann eds., 2006); Matthew Finkin, *The Death and Transfiguration of Labor Law*, 33 COMP. LAB. L. & POL'Y J. 171 (2011).

3. Regarding Harvard, see Matthew W. Finkin, *The Marginalization of Academic Labor Law: A Footnote to Estlund and Summers*, 23 COMP. LAB. L. & POL'Y J. 811, 815 (2002). Regarding Wisconsin, see UNIVERSITY OF WISCONSIN LAW SCHOOL, 1922 PROF. WILLIAM RICE OFFERS ONE OF THE FIRST LABOR LAW COURSES IN THE COUNTRY, http://law.wisc.edu/about/lore/events.html (last updated Sept. 21 2012).

4. *See* Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 270 (2009).

5. JOHN WILLIS, A HISTORY OF DALHOUSIE LAW SCHOOL 79–80 (1979).

6. For references to the origins of academic labor law in the United States, the United Kingdom, Canada, and several European countries, see *Symposium: National Style in Labor Law and Social Science Scholarship*, 23 COMP. LAB. L. & POL'Y J. 639 (2002).

7. "Labor law" first appears as a subject in the following encyclopedias in the years indicated: AMERICAN DIGEST, *Labor Relations* (1957); CANADIAN ABRIDGEMENT, *Labour Law* (1957);

But then, as academic labor law appeared to flourish, its scope began to change. First, "labor law" came to be understood (especially in North America) as the law governing collective labor relations, while "employment law" addressed the employment relations of individual, nonunionized workers. Then, in the 1970s and 1980s, employment and labor law began to dissolve into new subspecialties, such as discrimination law, pension law, and occupational health and safety law which emerged as separate domains of teaching, scholarship, and practice. By contrast, rather than dissolving into a number of distinct subspecialties, continental European labor law has generally remained part of a broader array of work-related policy concerns. Leading scholars have taken labor law "beyond employment,"[8] labor law has been embedded in the EU's constitution,[9] and it is increasingly subsumed into or overshadowed by "social law," the law of the welfare state.[10] This may explain why—relative to Canada, the United States, and the United Kingdom—it continues to flourish in most continental countries as both an intellectual project and as a focus of political action and public policy.

Conceivably, too, the changing meaning and diminished domain of labor law in the English-speaking world might be attributable to its doctrinal, normative and political incoherence. As Table 1 suggests, labor law in the broadest sense is drawn from a wide range of legal sources which, in turn, implicate and give effect to very different values and assumptions about social and economic relations and about what legal-institutional arrangements ought to shape those relations.

CANADIAN ENCYCLOPEDIC DIGEST, *Labour Law* (1955); HALSBURY, THE LAWS OF ENGLAND, *Trade and Labour* (1962). Earlier editions of several of these important law-finding resources contained entries on the subject *Trade Unions*.

8. ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001).

9. ROGER BLANPAIN, EUROPEAN LABOUR LAW 141–60 (12th ed. 2010).

10. Mauro Zamboni, *The "Social" in Social Law: An Analysis of a Concept in Disguise*, 9 J.L. SOC'Y 63 (2008).

Table 1: The Sources of Labor Law Broadly Defined

SOURCES OF LAW	LABOR LAW APPLICATION
Special Labor Laws	
Collective labor legislation	Relations among unions, employers, and workers
Employment standards legislation	Floor of rights/negotiation over floor
Occupational health and safety/ workers' compensation legislation	Reduces industrial accidents/illnesses; provides compensation
Social legislation	Unemployment/illness/retirement/ training
Fundamental Law	
Human rights legislation	Discrimination/harassment
Constitution/Charter of Rights and Freedoms	Regulatory jurisdiction/equality/mobility/ access to collective bargaining/strikes and picketing
General Law	
Criminal law	Picketing
Tort law	Picketing/strikes/boycotts/workplace injury
Contract law	Employment contract/internal union affairs
Property law	Picketing/union solicitation
Trust law	Pension/benefit funds
Administrative law	Judicial review of labor tribunals
Specific Statutory Regimes	
Competition law	Employer associations
Corporate law	Employee voice/management responsibilities
Intellectual property law	Noncompetition/ownership of inventions
Immigration law	Migratory workers
Taxation law	Self-employment
Trade law	Goods excluded if child/convict labor
International Law	
UN charters of human/social rights	Freedom of association/equality
ILO conventions	Directly bind/influence interpretation of domestic labor law
NAALC/EU Social chapter	Labor dimension of economic integration
Nonstate Law	
Transnational law	Codes of conduct
Government procurement policies	Minimum standards/employment equity
Custom/usage	Quotidian rules of workplace

Or perhaps labor law's failure to achieve a comprehensive and coherent system of labor market and workplace regulation (at least in North America) had less to do with its many conceptual and normative

contradictions and more to do with a series of awkward social and political facts. Forms of employment relations are proliferating and tending toward precarity[11]; the proportion of workers covered by some form of collective bargaining is rapidly shrinking, and industrial conflict is becoming increasingly rare[12]; the corporatist political economy that produced the Wagner Act and the so-called Fordist compromise of the post-war era has all but disappeared[13]; state regulation of labor markets (and other markets) is viewed with increasing suspicion and has been made more difficult to achieve by the advent of globalization[14]; and state support for the social safety net has been attacked—even in Europe—as too costly to sustain.[15] Contrariwise, the continuing salience and relative coherence of labor law in the coordinated market economies of Europe may be a reflection of political, social, and historical influences in those countries.

Finally, and most significantly, labor law may be facing an existential crisis brought on by the diminished salience of "labor."[16] For many of its architects and practitioners, the project of labor law was not just to better integrate diverse legal concepts or to achieve greater coherence in regulatory policies and practices. It was rather an attempt to repudiate the values and assumptions embedded in those concepts and to modify or transform the outcomes achieved by previous regulatory regimes. It was therefore, inevitably, an attempt to protect the rights, advance the interests, and regulate the conduct of "labor," of "workers" who were assigned that collective identifier as members of a class or movement, as bearers of a shared cultural identity, or as a factor of production.[17] But however described, whether in the language of political economy or sociology or scientific management, the terms "labor" and "worker" are being emptied of meaning. As Table 2 suggests, the way in which workers' subjectively perceive themselves no longer resembles either the objective reality of their

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11. GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 26–58 (2011); KATHERINE STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATIONS FOR THE CHANGING WORKPLACE 67–116 (2004).

12. Lucio Baccaro & Chris Howell, *A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism*, 39 POL. SOC'Y 521 (2011).

13. Michael L. Wachter, *Labour Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007).

14. *See, e.g.*, GLOBALIZATION AND THE FUTURE OF LABOUR LAW (John Craig & Michael Lynk eds., 2006); LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan et al. eds., 2002).

15. Christoph Hermann, *Neoliberalism in the European Union*, 79 STUD. POL. ECON. 61 (2007).

16. I have developed this argument more fully elsewhere. *See* Harry Arthurs, *What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note †, at 373 and Harry Arthurs, *Labour Law After Labour*, *in* THE IDEA OF LABOUR LAW 13 (Guy Davidov & Brian Langille eds., 2011).

17. For a recent eloquent expression of this view, see, e.g., Manfred Weiss, *Re-Inventing Labour Law?*, *in* THE IDEA OF LABOUR LAW, *supra* note 16, at 43; Richard Mitchell, *Where Are We Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Progress of Change* (Mar. 15, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615196.

situation or the paradigm of the employment relation that is embedded in all systems of labor law.

Table 2: What Makes Labor Labor?

	"Objective" Reality/Labor Law Paradigm	**"Subjective" Perception of Workers**
Primary economic identity	Producer	Consumer
Socio-cultural nexus	Class/occupation	Education/lifestyle
Political determinant	Union membership/labor-left party affiliation	Gender/race/religion/ region/generation
Relation to employer	Subordination	Autonomy

To amplify: "labor" as a way of describing a social class and its cultural practices, a political and industrial movement, a distinct domain of public policy, and of legal theory and practice is disappearing from everyday usage. This is not because workers no longer need whatever power or protection labor law gave them. They do need it, and arguably more than ever. Workers in most advanced countries are receiving a shrinking share of GDP[18]; their individual and collective bargaining power vis-à-vis employers has declined sharply; they face declining prospects of finding a job, retaining it for much of their working lives, or earning generous wages and decent benefits. Worse yet: the social safety net on which they depend during crises in their employment history has become increasingly inadequate. One might expect that workers would react to these developments by mobilizing aggressively to defend their interests; but the contrary seems to be the case. Trade unions are losing members and power, and parties of the left are generally losing their working-class voters.[19]

The explanation, I suggest, is that "labor" is no longer perceived as a movement, a class, or a significant domain of public policy—though civil servants, managers, and economists continue to acknowledge the importance of "human resources." Nor are politicians and the news media

18. *See* OECD, *Tackling Inequality: Growing Income Inequality in OECD Countries—What Drives It and How Can Policy Tackle It?* (May 2, 2011), http://www.oecd.org/dataoecd/32/20/47723414.pdf.

19. Explanations vary widely. *See, e.g.*, DICK HOUTMAN, PETER ACHTERBERG & ANTON DERKS, FAREWELL TO THE LEFTIST WORKING CLASS 15–35, 55–70 (2008); Jonas Pontusson & David Rueda, *The Politics of Inequality: Voter Mobilization and Left Parties in Advanced Industrial States*, 43 COMP. POL. STUD. 675 (2010); Jeroen van der Waal, Peter Achterberg & Dick Hautman, *Class Is Not Dead—It Has Been Buried Alive: Class Voting and Cultural Voting in Postwar Western Societies (1956–1990)*, 35 POL. & SOC'Y 403 (2007). For a more skeptical view, see Carlo Barone, Mario Lucchini & Simone Sarti, *Class and Political Preferences in Europe: A Multilevel Analysis of Trends over Time*, 23 EUR. SOC. REV. 373 (2007).

much concerned with the plight of "workers," though they bemoan the decline of the "middle class" and exploit fears of a growing underclass. Nor do many large corporate law firms any longer view labor law as a service worth providing to their clients. Most importantly, workers no longer see themselves as "workers"—as a class or collectivity whose members share common experiences, confront a common adversary and perceive concerted action as the way to advance their shared interests. Nor are labor's identity and solidarity still acknowledged by the media (virtually no newspapers or television networks have "labor" reporters) or reinforced by traditional signifiers (the cloth cap, the lunch bucket, the working class bar or pub, the Labor Day parade have all but disappeared). Workers now seem to prefer alternative identities: as consumers and investors rather than as producers; as members of families, communities or affinity groups based on religion, sport or sexual preference rather than of unions and labor-friendly political parties; as candidates for, or core members of, the "middle class" rather than as members of the "working class." Now to make the obvious point: if workers do not perceive that they have collective interests, if they are not committed to a collective identity and collective action, there is not much collective labor law can do to improve their lot.

Can employment law—labor law minus its collective dimension—take up the slack? In principle, individual workers in most developed countries enjoy formal legal protection against wrongful dismissal,[20] harassment and discrimination, unhealthy or unsafe working conditions, nonpayment of wages or benefits, or wrongful withholding of vacations or pensions. However, in practice government agencies charged with enforcing protective labor legislation often lack staff, zeal, or remedial powers, while ordinary civil litigation is usually too slow, expensive, and uncertain to be much use to rank-and-file workers. Employment law, in other words, is not the continuation of labor law by other means.[21]

So if "workers" and "labor" are no more, if labor law has run its course, and if employment law offers at best an inadequate substitute, how should we think about the legal regulation of labor markets and workplace relations?

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20. Arguably, the United States with its default doctrine of "employment at will" is the exception; but the United States has developed a series of targeted protections for women, minorities, and the disabled, while the once-sacrosanct legally prescribed contract of employment in many European countries is being rewritten to reduce worker's job rights. *See, e.g.*, Bruno Caruso, *"The Employment Contract Is Dead: Hurrah for the Labour Contract!" A European Perspective*, EMPLOYMENT REGULATION AFTER THE STANDARD CONTRACT OF EMPLOYMENT: INNOVATIONS IN REGULATORY DESIGN (Katherine Stone & Harry Arthurs eds., 2013) [hereinafter INNOVATION IN REGULATORY DESIGN]; Katherine V. W. Stone, *The Instability of Labor Contracts: The Impact of Globalization and Flexibilization on Employment Regulation*, *supra* INNOVATION IN REGULATORY DESIGN.

21. *See* Harry Arthurs, *Changing the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation*, 34 DALHOUSIE L.J. 1 (2011).

II. THE LAW OF ECONOMIC SUBORDINATION AND RESISTANCE: A COUNTERFACTUAL

The rise and fall of labor law in the twentieth century was a legal and historical development of great significance. One way to imagine labor law's future is therefore to consider what historians describe as a "counterfactual"—something that did not happen but might have. Suppose that during the interwar years—during the 1920s or 1930s—the pioneers of labor law had decided that abuses attributable to disparities of economic power were not unique to labor markets. Suppose that they had therefore invented not labor law but "the law of economic subordination and resistance"? Suppose further that they had developed a body of legal learning and a repertoire of legal techniques that dealt comprehensively with the regulation not just of employment relationships and labor markets, but of all relationships and markets in which individuals are experiencing economic subordination, resisting it through strategies of self-defense, and seeking redress against it in various legal forums.[22] Alternatively, suppose that having developed labor law's analytical concepts and systemic architecture, they subsequently realized that similar concepts and systems might be useful in protecting other constituencies of vulnerable individuals against super-ordinate economic power.[23]

In Appendix A, I have developed a crude model depicting this "counterfactual." It identifies as its potential beneficiaries not only organized but unorganized workers; the self-employed, the precariously employed and the unemployed; independent professionals and autonomous workers; consumers, debtors and mortgagors; small investors and owners of small business franchises; and farmers, tenants and welfare recipients. It also shows how laws might (and sometimes do) protect members of these groups from their powerful market adversaries in rather similar ways: by guaranteeing their right to speak in a collective voice, to engage in collective negotiations and to mobilize concerted pressure; by requiring the super-ordinate power to treat subordinate parties in accordance with at least minimally decent, nonderogable standards; by establishing formal or informal procedures for resolving disputes between the super-ordinate and subordinate parties; by providing alternative arrangements for individuals whose circumstances are not appropriate for resolution within the new system; and not least by legally entrenching the new regulatory architecture

22. Arguably, the cadre of lawyers that drafted the New Deal legislation did exactly that. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 191–230 (1976); PETER H. IRONS, THE NEW DEAL LAWYERS 3–14, 226–53 (1982).

23. *See* LEON GREEN, CASES ON INJURIES TO RELATIONS (1940).

while allowing for the possibility that subordinate parties can use political leverage and moral arguments to seek improvements in that architecture.

Admittedly, my model in Appendix A suffers from significant deficiencies. The list of potential beneficiaries—individuals experiencing economic subordination—is almost certainly incomplete. The many forms of self-help and legal regulation used by subordinated groups to resist or limit subordination are only partially captured. The model does not explain why some subordinate groups fail to develop successful legal, social, or political strategies of resistance while others succeed or why once-successful strategies—like collective bargaining—ultimately prove inadequate. And, of course, I have committed the cardinal sin of transforming the Wagner Act—the quintessential example of North American exceptionalism[24]—into a template that arguably has little salience for workers in Italy or France, or for that matter, tenants, or small business franchisees in Canada or the United States.

These are serious deficiencies indeed. Nonetheless, the model at least enables us to think about our counterfactual, about an academic subject, professional specialty, or policy discourse that—had it developed—might have been called "the law of economic subordination and resistance." Moreover, it allows us to focus on its most salient characteristic: the integration of what up to now have been separate subjects, specialties, or discourses. For both workers and other subordinated groups, integration might have held—may still hold—considerable appeal.

Labor law's claim to uniqueness has always rested on some version of the proposition that "labor is not a commodity."[25] However, this claim has also exposed labor law to the criticism that workers were seeking unique "privileges" to commit what in other contexts might be torts or crimes, to the enjoyment of economic advantages not available to nonlabor groups, such as small business owners or farmers, and to direct representation in the political process through a class-based party.[26] But suppose that labor law had adopted instead a different foundational proposition: "the subordination of workers in the employment relation is but one representative example of the experience of many groups under capitalism, all of which should have the basic right to be protected from the arbitrary

24. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2004); Roy Adams, *The Wagner-Act Model: A Toxic System Beyond Repair*, 40 J. INDUS. REL. 122 (2002).

25. *See, e.g.*, David Beatty, *Labour Is Not a Commodity*, *in* STUDIES IN CONTRACT LAW (Barry Reiter & John Swan eds., 1980); Judy Fudge, *Labour As a "Fictive Commodity": Radically Reconceptualizing Labour Law*, *in* THE IDEA OF LABOUR LAW, *supra* note 16; Paul O'Higgins, *"Labour Is Not a Commodity"—An Irish Contribution to International Labour Law*, 26 INDUS. L.J. 225 (1997).

26. *See, e.g.*, Keith Syrett, *"Immunity," "Privilege," and "Right": British Trade Unions and the Language of Labour Law Reform*, 25 J.L. & SOC'Y 388 (1998).

exercise of private economic power." This might have removed the stigma of special pleading by labor, given other groups a stake in the success of labor's resistance and encouraged development of a comprehensive theory of protection and resistance that would have benefited all groups. It would also have provided workers themselves with a continuing justification for resistance and the law with a continuing rationale for the regulation of workplaces and labor markets, despite the collapse of "labor" as a significant legal, political, and sociological category.

Then, what might have been the basic content of a counterfactual "law of economic subordination and resistance"?

To make explicit what is implicit in Appendix A, the elements of such a law have long existed, although they are seldom collected within a comprehensive *schema* designed to emphasize their normative and functional connectedness. While the process by no means progressed in linear fashion, by the end of the nineteenth century, legislation had been introduced in most advanced economies to protect workers' interests, enlarge their rights, and/or modify restrictions on their collective activities.[27] Tenants began to enjoy security of tenure and protection against rent gouging in most countries during the First, and especially the Second, World War.[28] Consumer protection laws go back to the nineteenth century and beyond, and have proliferated since the 1960s.[29] Farmers have participated in purchasing and marketing cooperatives since the nineteenth century[30] and in legislatively sanctioned supply management schemes for much of the twentieth.[31] Long-standing laws against securities fraud, insider trading, and the oppression of minority shareholders were introduced, updated, or strengthened following the financial crash of 1929.[32] At least since the Great Depression, governments have been enacting regulations to protect defaulting mortgagors and creditors against forfeiture and especially against the illicit pressure tactics of lenders.[33] Procedural due process for welfare recipients, whether constitutionally

27. Roy J. Adams, *Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences*, 14 COMP. LAB. L.J. 272 (1992).

28. JOEL F. BRENNER & HERBERT M. FRANKLIN, RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES (1977).

29. Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 34, 38 (1984).

30. LOUIS AUBREY WOOD, A HISTORY OF FARMERS' MOVEMENTS IN CANADA (1975).

31. WILLIAM E. MORRISS, CHOSEN INSTRUMENT: A HISTORY OF THE CANADIAN WHEAT BOARD, THE MCIVER YEARS (1987).

32. Bernard J. Kilbride, *The British Heritage of Securities Legislation in the United States*, 17 SW. L.J. 258 (1963); Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL'Y HIST. 257 (2005).

33. W. T. Easterbrook, *Agricultural Debt Adjustment*, 2 CAN. J. ECON. & POL. SCI. 390 (1939); S. W. Field, *The Limitation of the Right of Free Contract in Alberta*, 6 U. TORONTO L.J. 86 (1945).

guaranteed or not,[34] is mandated by many welfare regimes and even practiced by some.[35] Self-governing professions in some countries have had the legal right to fix prices for standard services[36]; in others they have used union-like tactics to secure favorable terms for services rendered through state-sponsored schemes of health care or legal aid.[37] Cab owners, self-employed truck drivers and fishers have either been "deemed" to be employees eligible for conventional collective bargaining,[38] provided with a special regulatory regime under which they may engage in collective negotiations,[39] or (competition laws to the contrary notwithstanding) simply allowed to act in concert to defend themselves against their "super-ordinate other."[40]

True, these experiments in the protection of subordinate groups have been scattered across time and space. True, they have not been integrated into a coherent body of legal theory, principles, rules, and institutions. But—I argue—perhaps they might have been or should be.

Take the right of economically subordinate groups to protect their interests through the use of concerted economic pressure: why not treat rent

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34. Mathews v. Eldridge, 424 U.S. 219 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

35. JOEL HANDLER, PROTECTING THE SOCIAL SERVICE CLIENT: LEGAL AND STRUCTURAL CONTROLS ON OFFICIAL DISCRETION (1978); Jan L. Hagen, *Justice for the Welfare Recipient: Another Look at Welfare Fair Hearings*, 57 SOC. SERV. REV. 177 (1983); *see also* Ontario Works Act, S.O. 1997, c. 25, §§ 24–36 (Can.); CENTER FOR EMPLOYMENT AND ECONOMIC SUPPORT, TEMPORARY ASSISTANCE SOURCEBOOK NEW YORK c.4 § D (2012), http://otda.ny.gov/programs/temporary-assistance/TASB.pdf.

36. Professional fee tariffs in the United States have been held to be illegal under antitrust legislation. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). However, a number of Canadian professions retain the right to set or suggest fees. *See* Timothy R. Muzondo & Bohumir Pazderka, *Occupational Licensing and Professional Incomes in Canada*, 13 CAN. J. ECON. 659 (1980).

37. For recent examples of actual or potential concerted refusals to work by publicly remunerated professionals see Adam Radwanski & Karen Howlett, *McGuinty Sends Message by Forcing Lower Fees on Ontario Doctors*, GLOBE & MAIL, May 14, 2012, http://www.theglobeandmail.com/news/politics/ontario-cuts-fees-to-doctors-on-some-procedures/article2424865/; *Lawyers Set to Expand Boycott of Ontario Legal Aid Cases*, TORONTO STAR, Jan. 10, 2010, http://www.thestar.com/news/ontario/article/748904—lawyers-set-to-expand-boycott-of-ontario-legal-aid-cases. *See also* Sujit Choudry & Troyen A. Brennan, *Collective Bargaining by Physicians—Labour Law, Antitrust Law, and Organized Medicine*, 345 NEW ENG. J. MED. 1141 (2001).

38. Harry Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965).

39. E.g., in Nova Scotia, the Fisherman's Federation Act, N.S. c.40 (1947) (Can.) established a special collective bargaining regime for fishermen. In 1971, the statute was repealed, and fishermen were brought under the general legislation governing collective bargaining, Trade Union Act, N.S. c.19 §1(1)(k)(ii) (1972) (Can.), which defined "employee" to include "a person employed or engaged on fishing vessels of all types or in the operation of these vessels." *See also* Fisheries Organizations Support Act, S.N.S. c.6 (1995–1996) (Can.). In Newfoundland and Labrador, by contrast, collective bargaining continues to be conducted under the Fishing Industry Collective Bargaining Act, R.S.N.L. c.F-18 (1990); Charles Steinberg, *Collective Bargaining Rights in the Canadian Sea Fisheries: A Case Study of Nova Scotia* (Columbia University, unpublished Ph.D. dissertation, 1973).

40. *See, e.g.*, Arthurs, *supra* note 38; Bernard D. Meltzer, *Labour Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

strikes, consumer boycotts, and welfare sit-ins as the legal, as well as the functional and moral, equivalent of industrial action by workers? Or take strategies adopted by governments to structure countervailing power in different parts of the economy: there are important similarities between agricultural marketing agencies and self-governing trades and professions, on the one hand, and the Wagner model of collective bargaining on the other. Or take the statutory implication of terms or the regulation of prices in order to protect the weaker party to a contractual relationship: why do we not perceive the link between rescission clauses in consumer protection statutes and the regulation of automobile insurance rates on the one hand, and on the other labor standards legislation that forbids derogation from the minimum wages and maximum working hours prescribed by statute?

Finally, recognition of a comprehensive "law of economic subordination and resistance"—making visible and explicit the connections between labor law and related regimes—might have had certain advantages for labor law scholarship.

In the first place, it might have carried labor law farther along the trajectory on which it was launched when it broke free of contract, tort, and criminal law and began to develop its own distinctive analytical categories and discursive conventions. Instead of relying on special pleading to the effect that the unique character of employment relations requires, in effect, a semi-autonomous legal subsystem,[41] labor law might have presented itself as part of a broad array of differentiated but related subsystems that collectively challenged some core conceptions of the law of industrial and postindustrial capitalism. This might arguably have given labor law a stronger claim to legitimacy, made its claims seem less anomalous, and enriched it with insights from adjacent domains of legal resistance. It might have provided a more congenial home for antidiscrimination, social welfare, employment standards and health and safety law—subjects which have either had to accept their subordinate status as "labor law's little sister"[42] or to put on constitutional airs in order to rise above it.[43]

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41. *Mea culpa*, see Harry Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CAN. B. REV. 786 (1967); Harry Arthurs, *Understanding Labour Law: The Debate Over "Industrial Pluralism,"* 38 CURRENT LEGAL PROBS. 83 (1985); *see also* Lord Wedderburn, *Labour Law: From Here to Autonomy?*, 16 INDUS. L.J. 1 (1987); Lord Wedderburn, *Labour Law: Autonomy from the Common Law*, 9 COMP. LAB. L. & POL'Y J. 219 (1988).

42. JUDY FUDGE, LABOUR LAW'S LITTLE SISTER: THE EMPLOYMENT STANDARDS ACT AND THE FEMINIZATION OF LABOUR (1991).

43. DAVID BEATTY, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (1987).

III. THE COUNTERFACTUAL IN THE HISTORICAL NARRATIVE OF NORTH AMERICAN LABOR LAW

To be fair, there are good reasons why a law of "economic subordination and resistance" has not developed so far. While "economic subordination" may be experienced by all the groups I have mentioned, it is by no means clear that they have much else in common. They inhabit different markets, experience different forms of subordination at the hands of different superordinate powers, confront different prospects for mobilizing for collective action in defense of their interests, and can arguably be protected most effectively by different strategies of state intervention. Moreover, it is by no means certain that attempts to develop an integrated legal response to their plight would in fact result in greater conceptual coherence or normative consistency than labor law presently exhibits; indeed, the contrary is more likely. Nonetheless, while I have described the law of economic subordination and resistance as a "counterfactual," on several occasions both the United States and Canada have come tantalizingly close to embedding labor law in an integrated network of legal regimes that protect not only workers but other economically subordinate groups.

During the Progressive era in the United States—roughly the 1880s through the 1920s—workers, farmers, and small businesses sometimes found common cause in opposing a particularly rapacious and notoriously unregulated variant of capitalism. In reaction, antitrust laws and regulation of utility rates were often advocated by the same politicians, academics, and journalists who supported labor's demands for safer workplaces and collective bargaining.[44] For a variety of reasons, however, Progressive initiatives succeeded only sporadically and at the local level.[45]

The most ambitious and successful attempt to align labor law with other legal initiatives to protect a broad spectrum of economically subordinate people occurred only at the very end of this era, during the Great Depression. Roosevelt's National Industrial Recovery Act (NIRA), enacted in 1933, bore a striking resemblance to the counterfactual "law of economic subordination and resistance."[46] It established codes of fair competition for numerous industries, protected consumers and small businesses from predatory practices, regulated the price of many consumer products, and created a program of public works to provide the unemployed

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44. ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877–1917, at 106–08, 118–20 (1999).

45. DANIEL ROGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

46. National Industrial Recovery Act, 15 U.S.C. § 703 (1933). For a brief summary see Milton Handler, *The National Industrial Recovery Act*, 19 A.B.A. J. 440 (1933).

with a chance to earn a living. The same legislation also guaranteed workers minimum wages and decent working conditions, and provided templates for the subsequent Wagner and Fair Labor Standards Acts, while companion statutes dealt with the agricultural economy and related matters. There are many reasons to be critical of the politics, design, and execution of the NIRA, which was struck down by the U.S. Supreme Court in 1935 on the grounds that it violated the division of powers between the federal and state governments and between the executive and legislative branches.[47] Nonetheless, the Act did attempt to comprehensively address the disparate concerns of economically subordinate victims of a capitalist economy in deep moral, structural, and operational crisis and as noted, many of its features were subsequently enacted as separate statutes.

Canadian history also offers tantalizing glimpses of what might have been. For example, the Combines Investigation Act of 1889 sought to protect farmers, consumers, and small businesses against the same corporations that were seen to oppress workers.[48] Both the Combines Act and labor legislation (enacted two decades later) were administered by the Department of Labor and its founding Deputy Minister, Mackenzie King; and both for a time placed primary reliance on strategies of investigation, conciliation, and the mobilization of public opinion.[49] Then, in the mid-1930s, the so-called Bennett New Deal—emulating its American namesake—proposed to provide public works programs and minimum employment standards for workers; grants and supply management schemes for farmers; and pensions, health insurance and deposit insurance for everyone. Whether and to what extent Prime Minister Bennett, a Conservative, actually intended to enact and implement a U.S. style "New Deal" is very much open to question.[50] Bennett's version of a compendious "law of economic subordination and resistance" was partially abandoned on the drawing boards, partially appropriated by the opposition Liberals who defeated him shortly after he announced his New Deal program, and partially struck down by the courts.[51] However, it shows that even highly

47. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

48. The Combines Investigation Act, S.C. c.41 (1889) (Can). *But see* Michael Bliss, *Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910*, 47 BUS. HIST. REV. 177 (1973) (arguing that the legislation merely declared the common law and was neither intended to nor, in fact, reduced corporate power).

49. W.L. Mackenzie King, *The Canadian Combines Investigation Act*, 42 ANNALS AM. ACAD. POL. & SOC. SCI. 149 (1912); V.W. Bladen, *A Note on the Reports of Public Investigations into Combines in Canada, 1888-1932*, 5 CONTRIBUTIONS CAN. ECON. 61 (1932).

50. Donald Forster & Colin Read, *The Politics of Opportunism: The New Deal Broadcasts*, 60 CAN. HIST. REV. 324 (1979).

51. RICHARD WILBUR, THE BENNETT ADMINISTRATION 1930–1935 (1969), http://www.collectionscanada.gc.ca/obj/008004/f2/H-24_en.pdf; RICHARD WILBUR, THE BENNETT NEW DEAL: FRAUD OR

conservative public figures could perceive that the problems encountered by these groups were related, arguably mutually reinforcing, and required an integrated response. In the 1930s as well, provincial attempts to regulate the use of economic power—sometimes cautious, sometimes ill considered—were perceived by contemporary observers[52] as closely related if not carefully integrated reactions to the Great Depression. By way of example, Alberta's Social Credit government adopted extensive debtor relief statutes. Ontario's Industrial Standards Act and Québec's Collective Agreements Extension Act allowed workers and employers to establish industry-wide standards for sectoral labor markets.[53] Legislation in those and other provinces gave farmers comparable control over particular commodities markets.[54] Then, in the early 1940s, the federal government used its wartime "emergency" powers to regulate labor, housing, consumer, financial, commodities, and other markets not only to mobilize resources required for military purposes, but to forestall the social strife that would ensue if dominant corporations were given free reign and vulnerable groups and individuals were left without protection.[55]

These counterfactual episodes often ended in disappointment. The common law doctrine of restraint of trade, the progenitor of the Combines Act, was frequently used to delegitimate concerted action by workers.[56] Elements of the Bennett New Deal were struck down by the courts[57]; provincial legislation protecting debtors was disallowed[58]; supply management survived for some time in some sectors, but now seems likely to be swept away entirely as an impediment to free trade[59]; and other

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PORTENT (1969); F.R. Scott, *The Privy Council and Mr. Bennett's "New Deal" Legislation*, 3 CAN. J. ECON. & POL. SCI. 234 (1937).

52. These developments were closely tracked by a committee of the Canadian Bar Association, which published an annual report with commentary throughout the 1930s. *See, e.g.*, D. J. Thom, *Noteworthy Changes in the Statue Law, 1935*, 13 CAN. B. REV. 487 (1935).

53. Industrial Standards Act, S.O., c.28 (1935) (Can.); Collective Labour Agreements Extension Act, Q.S. c.56 (1934) (Can.).

54. *See, e.g.*, Produce Marketing Act, B.C., c. 54, (1926–1927) (Can); Dairy Products Sales Adjustment Act, 1929, S.B.C. c. 20 (1929) (Can.); Farm Products Control Act, R.S.O c.75 (1937) (Can.); The Milk Control Act, R.S.O. c.76 (1937) (Can); Municipalities Relief and Agricultural Aid Act, R.S.S., c.159 (1940) (Can.); Farmers' Creditors Arrangement Act, 1934, S.C., c.53 (1934) (Can.); Farm Security Act, S.S., c.30 (1944) (Can.); An Act Respecting the Pledge of Agricultural Property, S.Q., c.69 (1940) (Can.).

55. *See, e.g.*, JUDY FUDGE & ERIC TUCKER, LABOUR BEFORE THE LAW: REGULATION OF WORKERS' COLLECTIVE ACTION IN CANADA 1900–1948, at 228–301 (2004); K. W. Taylor, *Canadian War-Time Price Controls, 1941-1946*, 13 CAN. J. ECON. & POL. SCI. 81 (1947).

56. W. P. M. KENNEDY & JACOB FINKELMAN, THE RIGHT TO TRADE: AN ESSAY IN THE LAW OF TORT (1933).

57. Scott, *supra* note 51.

58. J.R. Mallory, *Disallowance and the National Interest: The Alberta Social Credit Legislation of 1937*, 14 CAN. J. ECON. & POL. SCI. 342 (1948).

59. Robert D. Tamilia & Sylvain Charlebois, *The Importance of Marketing Boards in Canada: A Twenty-First Century Perspective*, 109 BRIT. FOOD J. 119 (2007).

wartime interventions in markets—e.g., rent controls—survived only in vestigial form.[60] Finally, the same wartime regulations that conferred rights on unions also subjected them to significant constraints, which have become "normalized" as essential elements of our labor law.[61] Nonetheless, looking back on these counterfactual developments scattered through the first half of the twentieth century, we can see how labor law was briefly—and might have become in the long term—embedded in a larger and more ambitious strategy to protect vulnerable individuals from superordinate corporate power.

Of course, no such ambitious strategy actually took hold. Ironically, unions, in their heyday, sometimes functioned not only as advocates for subordinated workers but also as gatekeepers, restricting the labor market opportunities of women, immigrants, and members of visible minority groups.[62] Now that heyday is past and with it, much of the discrimination practiced by unions. However, while some unions vigorously and effectively represent a broad spectrum of "economically subordinate" workers, many others that have survived represent a relatively privileged employee elite. Unions of professional athletes have been spectacularly successful, securing fabulous wealth for their members, gaining part-ownership of the means of production, and, apparently, solving the problem of regulating labor markets across national boundaries.[63] Unions in the broader public sector—whose members hold relatively well-paying and secure jobs—currently account for an absolute majority of all union members.[64] Union pension and benefit funds now comprise one of Canada's largest pools of investment capital[65] (although the financial leverage they represent is seldom used to advance the interests of workers who lack pensions and other benefits).[66] Nor do labor law regimes

60. Residential Tenancies Act, S.O., c.17 (2006) (Can.); An Act Respecting the Régie du Logement, R.S.Q., c.R-8.1 (2010) (Can.).

61. FUDGE & TUCKER, *supra* note 55.

62. The conceptual basis of the argument is contested, the evidence is ambiguous, and the situation is in flux. *See, e.g.*, Sue Ledwith & Fiona Colgan, *Tackling Gender, Diversity and Trade Union Democracy: A Worldwide Project?*, *in* GENDER DIVERSITY AND TRADE UNIONS: INTERNATIONAL PERSPECTIVES 1 (Fiona Colgan & Sue Ledwith eds., 2001); Jonathan S. Leonard, *The Effects of Unions on the Employment of Blacks, Hispanics, and Women*, 39 INDUS. & LAB. REL. REV. 115 (1985); Dennis R. Maki, *Unions As "Gatekeepers" of Occupational Sex Discrimination: Canadian Evidence*, 15 APPLIED ECON. 469 (1983).

63. For a history of the rise of U.S.-based players' unions see Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267.

64. David G. Blanchflower, *International Patterns of Union Membership*, 45 BRIT. J. INDUS. REL. 1, 4 (2008).

65. ONTARIO EXPERT COMMISSION ON PENSIONS, A FINE BALANCE: SAFE PENSIONS/AFFORDABLE PLANS/FAIR RULES 35 (2008).

66. Harry Arthurs & Claire Mummé, *From Governance to Political Economy: Insights from a Study of Relations Between Corporations and Workers*, *in* THE EMBEDDED FIRM: CORPORATE

designed to protect individual unorganized "employees" necessarily reach the most "economically subordinate" workers. To cite one example: the Supreme Court's recent progressive decisions on wrongful dismissal are more likely to benefit highly paid executives, managers, and professionals than rank-and-file workers.[67] Or another: male workers in relatively secure standard jobs are much better served by the Canadian employment insurance system than precarious workers—often women, young people, and immigrants—and the chronically or seasonally unemployed.[68] Or a third: fewer and fewer nonunion workers are covered by generous defined benefit pension plans,[69] but such plans remain widely available to privileged managerial and professional employees.

IV. CONCLUSION: THE COUNTERFACTUAL AS THE NARRATIVE OF LABOR LAW'S FUTURE?

Interest in labor law's reconceptualization as part of a comprehensive "law of economic subordination and resistance" has tended to increase during moral or social crises or crises of political economy. Whether today's crisis of capitalism is as extreme as the one that produced the NIRA and the Bennett New Deal in the 1930s is a moot point. On the one hand, the crisis has energized what Daniel Drache calls "defiant publics"—the Indignants of Madrid and Athens, the Occupy Movement in New York, the 99% Movement in Vancouver, the Antigreed marchers in Rome.[70] On the other hand, these "defiant publics" have not yet formed a coherent movement: they have no organization, no ideology, no program, no strategy, no blueprint for institutional reform, and certainly no legal agenda. Their members know that they are economically subordinate, and they want to resist. They, however, have neither a cure for the current travails of capitalism nor an alternative to it. I note especially that none of these

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GOVERNANCE, LABOR AND FINANCE CAPITALISM 350, 365–67 (Cynthia Williams & Peer Zumbansen eds., 2011).

67. Since 1992, the Supreme Court of Canada has decided seven wrongful dismissal cases. In only one of these was the plaintiff a rank-and-file worker. *See* Honda v Keays, [2008] 2 S.C.R. 362 (assembly line worker). In the other six cases, the plaintiff was in a managerial or equivalent position. *See* Machtinger v HOJ Industries, [1992] 1 S.C.R. 986 (credit and sales manager); Wallace v United Grain Growers, [1997] 3 S.C.R. 701 (sales manager); Farber v Royal Trust, [1997] 1 S.C.R. 846 (regional manager); Dowling v Halifax, [1998] 1 S.C.R. 22 (works supervisor); McKinley v BC Telephone, [2001] 2 S.C.R. 161 (accountant/senior financial officer); Evans v Teamsters, [2008] 1 S.C.R. 661 (union business agent).

68. Leah F. Vosko, *The Challenge of Expanding EI Coverage: Charting Exclusions and Partial Exclusions on the Bases of Gender, Immigration Status, Age, and Place of Residence and Exploring Avenues for Inclusive Policy Redesign*, (Mowat Centre EI Task Force, 2011), http://www.mowateit askforce.ca/sites/default/files/Vosko_1.pdf.

69. Frank Eich, *The Importance of Defined-Benefit Occupational Pension Schemes in Selected OECD Countries* (Pension Corporation Research, 2010), http://hdl.handle.net/10419/54556.

70. DANIEL DRACHE, DEFIANT PUBLICS (2008).

movements is calling for "a new NIRA"—a comprehensive program to deal with widespread economic subordination. On the contrary, some of these movements (not all[71]) appear quite hostile to the idea of the state and to governments of any stripe. They might well reject a new NIRA on the grounds that it would reinforce the political economy, the political system, and political class that have brought the advanced economies to their present discontents.[72]

Nonetheless, we should not neglect the narrative of resistance, which is by no means "counterfactual." Here and there, usually on an *ad hoc* basis, diverse groupings of subordinate people have been able to band together to confront superordinate economic power. Examples include product boycotts organized by consumers, students, and religious groups to help end the exploitation of workers at home and abroad[73]; local community organizations, racial groups, and labor unions working together to secure job opportunities, decent working conditions, and "living wages" in U.S. cities[74]; online global networks of activists committed to revealing the shoddy employment, consumer, and environmental practices of large corporations[75]; demonstrations that have brought down governments[76]; and, forced international financial institutions to recalibrate their policies.[77] Perhaps out of these intermittent struggles and occasional victories, a new vision of labor law will ultimately emerge—a more ambitious vision that transcends the traditional boundaries of labor law and draws on "economic subordination and resistance" as its unifying theme. We must hope so. Without a new and plausible expression of how the law can and should

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71. For a minority view see THE ROOSEVELT INSTITUTE, http://www.rooseveltinstitute.org (last visited Mar. 12, 2013). The Institute is dedicated to "carrying forward the legacy and value of Franklin and Eleanor Roosevelt," and it supports the Occupy movement but sponsors research into and discussion of the "Next New Deal." *Id.*

72. *See, e.g.*, Marina Sitrin, *Horizontalism and the Occupy Movements*, 59 DISSENT 74 (2012); Heather Gautney, *What Is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST (Oct. 10, 2011), http://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story.html.

73. *See, e.g.*, Dana Frank, *Where Are the Workers in Consumer-Worker Alliances? Class Dynamics and the History of Consumer-Labor Campaigns*, 31 POL. & SOC'Y 262 (2003); Andrew Ross, *The Quandaries of Consumer Based Labor Activism—A Low-Wage Case Study*, 22 CULTURAL STUD. 770 (2008).

74. *See, e.g.*, Bruce Nissen, *The Effectiveness and Limits of Labor-Community Coalitions: Evidence from South Florida*, 29 LAB. STUD. J. 67 (2004); Katherine Stone & Scott Cummings, *Labor Activism in Local Politics: From CBAs to "CBAs," in* THE IDEA OF LABOUR LAW, *supra* note 16.

75. DRACHE, *supra* note 70.

76. Since the onset of the Great Recession, Conservative governments have fallen in Denmark, Ireland, Italy, and France, and labor or socialist governments have fallen in Spain, the United Kingdom, and Greece.

77. *See, e.g.*, Hamid Hosseini, *The Most Recent Crisis of Capitalism: To What Extent Will It Impact the Globalization of Recent Decades*, 12 J. APPLIED BUS. & ECON. 69 (2011); Bryan C. Mercurio, *Reflections on the World Trade Organization and the Prospects for Its Future*, 10 MELB. J. INT'L L. 49 (2009); Daniel Drezner, *Macro First: Policy Coordination After the Great Recession*, (Working Paper, 2009), *available at* http://ssrn.com/abstract=1497512 (2009).

ensure fairness and decency in economic relations, we may one day come to regard subordination as merely "the way things always have been" and to relegate all forms of resistance to the realm of the "counterfactual."

Appendix A

	Unionized Workers (North America)	Unorganized Workers	Professionals	Consumers	Farmers	Tenants	Small Investors
Voice Recognition of Representatives	Certification	Employee ass'ns, caucuses, OHSA, comms., class action	Professional ass'ns/licens-ing bodies	Class actions	Marketing boards, co-ops	Tenant Unions, Legal clinics	Proxy battles, oppression actions
Collective Negotiation	Duty to bargain in good faith	"Going rate," work rules and customs	Self-regulation/ ad hoc negotiat-ion	Litigation settlement	Collective pur-chases/sales	—	Litigation settlement
Concerted Economic Action	Limited right to strike/picket	Refuse to work in un-safe conditions, stop-page, web campaigns	Work stop-pages/work- to-rule	Boycotts	Demonstrat-ions, crop des-truction	Rent strikes, demonstrat-ions	—
Formal/Info rmal Dispute Resolution	Rights disputes: arbitration; Interest disputes: Mediation	—	Ad hoc mediation/ arbitration	—	—	Tribunals	Courts
Agreement	Formal, enforceable collective agreement	Individual contracts, codes of conduct, litigation settlements	Agreement w/ gov't agencies (legal aid, healt-hcare)	Codes of Conduct	—	Litigation settlement	Litigation settlement
Minimum standard terms	Nonderogable col-lective agreements/ OHSA	Employment standards/OHSA	Agreement w/ gov't agencies (legal &, health care), professional tariffs	Consumer legislation	Monopoly protection	Minimum terms, rent fixing, tenure protection	Securities reg-ulator, stock exchange, industry code
Political Action/affil-iation	Formal/weak/intermi ttent	Ad hoc community action/lobbying	Strong lobbying	Lobbying	Lobbying	—	—
Social Saf-ety Net	Workplace pensions & benefits/weak state provision	Weak state provision	Strong self-group provision	Weak regulation	Weak state provision	Limited tenure	Weak regulation
Constitution -al human rights claims	Speech/assembly/ association/due process	Race, gender, disability	Mobility rights/right to practice	—	—	—	—